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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

Nos. 41 a[redacted]

THE CHOCTAW NATION and THE CHICKASAW NATION,
Petitioners,

VERSUS

STATE OF OKLAHOMA, ET AL.,
Respondents.

REPLY BRIEF OF PETITIONERS, THE CHOCTAW NATION AND THE CHICKASAW NATION

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PETITION FOR CERTIORARI GRANTED APRIL 21, 1969

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. CE 5-0030

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REPLY BRIEF OF PETITIONERS, THE CHOCTAW NATION AND THE CHICKASAW NATION

The Respondents say in effect that because in surveying the Cherokee lands the surveyors went along the north bank of the Arkansas and the Canadian rivers, and in surveying the Choctaw lands they went along the south bank of the Arkansas and the Canadian rivers, it was obvious that each tribe's perimeter went only to the high water mark and the bed of those streams remain the property of the United States.

In one of its well-known cases against Texas, Oklahoma tried a similar ploy, claiming that the navigability of Red river was evidenced by the fact that the surveyor went down the north bank and did not extend the town-

ship and section lines across the river.[1] This Court made short shrift of the posed adjudicatory powers of a surveyor:

> "A legal inference of navigability is said to arise from the action of the surveying officers who, when surveying the lands in that region, ran a meander line along the northerly bank and did not extend the township and section lines across the river. But this has little significance. The same thing was done on the Platte and other large western streams known to be unnavigable. Besides, those officers were not clothed with power to settle questions of nevigability."

In *Gauthier* v. *Morrison*, 232 U.S. 452 at 458, 459, 58 L.Ed. 680 at 684, the Court, speaking through Mr. Justice Van Devanter, said:

> "The state courts seem to have proceeded upon the theory (a) that the surveyor's action in designating and meandering the 1,200 acre area as a lake operated as an authoritative determination that it was not agricultural land, but a permanent body of water; and (b) that this determination, while remaining undisturbed by the Land Department, took the land without the operation of the settlement laws, including the homestead law. But in this there was a misconception of the authority of the surveyor. He was not invested with power to determine the character of the land which he surveyed or left unsurveyed, or to classify it as within or without the operation of particular laws. All that he was to do in that regard was to note and report its character, as it appeared to him, as a means of enlarging the sources of information upon that subject otherwise available."

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[1] *State of Oklahoma* v. *State of Texas*, 258 U.S. 574, 585.

In *Barden* v. *Northern P. R. Co.*, 154 U.S. 288, 292, 320, 38 L.Ed. 992, 993, 999, 14 Sup.Ct.Rep. 1030, in disposing of a contention that the lands there in question had been determined and reported by the surveyor as agricultural and not mineral, and that the determination and report remained in force, the Court said:

> "But the conclusive answer to such alleged determination and report is that the matters to which they relate were not left to the Surveyor General. Neither he nor any of his subordinates was authorized to determine finally the character of any lands granted, or make any binding report thereon. Information of the character of all lands surveyed is required of surveying officers, so far as knowledge respecting them is obtained in the course of their duties, but they are not clothed with authority to especially examine as to these matters outside of their other duties, or determine them, nor does their report have any binding force. It is simply an addition made to the general information obtained from different sources on the subject."

We say as the Court said in *Gauthier* v. *Morrison*:

> "But in this there was a misconception of the authority of the surveyor. He was not invested with power to determine the character of the land which he surveyed or left unsurveyed, and to classify it within and without the operation of particular laws."

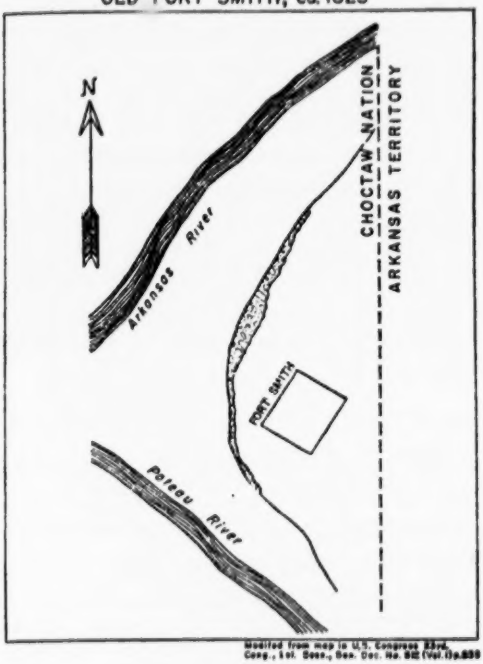
and as the Court said in *Barden* v. *Northern P. R. Co.*:

> "The conclusive answer to such alleged determination and report is that the matters to which they relate were not left to the Surveyor General. Neither he nor any of his subordinates was authorized to determine finally the character of any lands granted, or make any binding report thereon . . . they were not clothed with

authority to especially examine as to these matters outside of their other duties, or determine them, nor does their report have any binding force."

The speciousness of Oklahoma's labyrinthine exposition on the surveys made along the Arkansas river is profiled at pages 60 and 61 of its brief. There, in arguing that a surveyor's convenience in going down one bank of the other bank of the river should be accepted as a proper construction of the treaties of 1820 and 1830 between the United States and the Choctaws, it discusses the phrase in the Treaty of 1855 (a treaty which has not the least relevance to the issues in this case), "Beginning at a point on the Arkansas river 100 paces east of Old Fort Smith, where the western boundary line of the State of Arkansas crosses said river," saying: "The beginning point is *on* the Arkansas River and not *in* the River or *on the opposite bank* from Fort Smith." The phrase originated in the Treaty of 1825 by which the Choctaws retroceded to the United States that portion of the lands ceded to them by the Treaty of 1820 in what is now Arkansas. The purpose of the Treaty of 1825 was to establish a new east and west boundary between the United States and the Choctaws and the line so established is now the boundary between the State of Oklahoma and the State of Arkansas. It was not in the least the purpose of the Treaty of 1825 to establish the northeast corner of the Choctaw lands or to define the south bank of the Arkansas as the northern boundary of the Choctaws in the lands west of those with which that treaty was concerned. Indeed, it will be observed from the following illustration that the Arkansas river cannot be reached by going east from old Fort Smith.

OLD FORT SMITH, ca. 1825



Modified from map in U.S. Congress 33rd. Cong., 1st. Sess., Sen. Doc. No. 512 (Vol. II), p. 559

The Respondents say at page 70 of their brief: "Viewed through the eyes of a drafter of legal descriptions the land descriptions in the treaties, standing alone, actually exclude the river bed." But these treaties are not to be "viewed through the eyes of a drafter of legal descriptions," for, as this Court said in *Jones* v. *Meehan*, 175 U.S. 1, 10, 11:

> ". . . it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known

> to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language, and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

and in *Choctaw Nation* v. *U. S.*, 119 U.S. 1, 27, 28:

> "The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules, framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws.
>
> "The rules to be applied in the present case are those which govern public treaties, which, even in case of controversies between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations."

The Respondents profess not to be able to find in the facts surrounding the removal of the Choctaws from the southern states to the wild lands in the west a "public exigency" or a "compelling public purpose" for the United States to include the avulsed beds and the soil and the minerals underlying the navigable portion of the Arkansas

river to be included in its grant to the Choctaws. At pages 76 and 77 of their brief they quote the grandiloquence of a Congressman Mitchill in the debate on the Act erecting Louisiana into Two Territories and Providing for the Temporary Government Thereof:

> "That masses of virgin silver and gold glitter in the veins of the rocks which underlay the Arkansas itself, and mingle with the minerals near certain other of its streams, and offer themselves to the hand of him who will gather, refine, and convert them to use."

"Clearly," urge the Respondents, "a grant by the United States to any Indian tribe or tribes of a national asset of such value and importance should not be lightly inferred." It seems somewhat illogical that the United States would want to reserve to itself the silver and gold under the deep, treacherous and hard to-get-at navigable portion of the river while giving to the Choctaws the silver and gold that might be found in the uplands and in the shallower, safer stretches of the river.

If the Government were granting the uplands to the Choctaws there would be no plausible reason why it should reserve to itself the avulsed beds of the navigable portion of the river. And if it were granting to the Choctaws, as it did, all of the minerals in the uplands, then it would have no plausible reason for reserving to itself the minerals beneath the navigable portion of the Arkansas; and if it were granting to the Choctaws, as it did, the soils of the uplands, it had no plausible reason for reserving to itself the soils underlying the waters of the navigable portion of the Arkansas. None of these were an aid to the navigation

of the Arkansas. And that is the only need that the Government had for the river and it had that not by virtue of any reservation in a treaty but by the commerce clause of the Constitution.

In *Donnelly* v. *United States*, 228 U.S. 242, 33 S.Ct. Rep. 449 (1913), Donnelly was convicted of murder in the Circuit Court of the United States for the Northern District of California. The indictment charged him with the murder of one Chickasaw, an Indian, within the limits of an Indian reservation known as the Extension of Hoopa Valley Reservation in the Northern District of California. The evidence, as disclosed by the opinion of the Court, tended to show that Chickasaw was shot through the body and mortally wounded while he was in or near the edge of the water of the Klamath river. The conviction was based upon the laws which provided that certain general laws of the United States as to the punishment of crimes committed within the sole and exclusive jurisdiction of the United States "which extend to the Indian country."

The Hoopa Valley Reservation was first established in 1876. In 1891 it was extended to include "a tract of country one mile in width on each side of the Klamath River, and extending from the present limits of the said Hoopa Reservation to the Pacific ocean."

In 1850 California passed an act adopting the common law of England as a rule of decision in all courts of that state. The effect of which was to transfer to all riparian owners all the property of the State, if any she had, in the non-navigable streams and the soils beneath them. By statute in 1891 California enumerated the navigable rivers

within the State. The Supreme Court of that State holds that act to be exclusive so that no other rivers are navigable under the laws of California. The Klamath river was not among those enumerated.[2]

This Court inquired, does the reservation include the bed of the Klamath river? And in answer it said: [3]

> "The descriptive words of the order 'a tract of country 1 mile in width on each side of the Klamath river and extending,' etc. It seems to us clear that if the United States was the owner of the river bed, a reasonable construction of this language requires that the river be considered as included within the reservation. Indeed, in view of all the circumstances, it would be absurd to treat the order as intended to include the uplands to the width of 1 mile on each side of the river, and at the same time to exclude the river."

The Respondents say at page 8 of their brief that: "The United States intended eventually to include the area ceded to its ward in a future Territory or State." And that: "The Cherokees and Choctaws were aware of these policies, powers and rights when they made the treaties." And at page 44 of their brief they say: "The leaders of these Indian tribes who negotiated the treaties with the United States are not shown to be ignorant and uneducated savages," and by way of illustration point out that Patrick J. Hurley, a Choctaw, served with distinction as Secretary of War. Perhaps it would have been more edifying had they gone further and revealed that Patrick J. Hurley was a Choctaw

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[2] Second column, 33 S.Ct. Rep. 455.

[3] 33 S.Ct. Rep. 453, 454.

Indian of only 1/32nd blood and that he was Secretary of War 120 years after the Treaty at Doak's Stand was signed.

The Respondents' understanding of the cultural attainments of the Choctaws and their ability to deal as equals with such people as General Andrew Jackson and General Thomas Hinds, who negotiated the Treaty of 1820 on behalf of the United States, and Secretary of War Eaton and General Coffee, who negotiated the Treaty of 1830 on behalf of the United States, is somewhat at odds with the fact that the Commissioners for the United States communicated with the Indians through interpreters employed by them, and the fact that of the 103 Indians who signed the Treaty of 1820 on behalf of the Choctaw Nation, 99 signed by mark, and that of the 176 Indians who signed the Treaty of 1830 on behalf of the Choctaws, 166 signed by mark. In *Choctaw Nation* v. *United States,* 7 S.Ct. Rep. 90, this Court spoke of the Choctaws and the Cherokees as an "unlettered people" saying of the Treaty of 1830:[4]

> "It is notorious as a historical fact, as it abundantly appears from the record in this case, that great pressures had to be brought to bear upon the Indians to effect their removal, the whole treaty was evidently and purposely executed, *not so much as to secure to the Indians the rights for which they had stipulated, as to effectuate policy of the United States in regard to their removal.*
>
> * * * * * * *
>
> "It is, perhaps, impossible to interpret the language of this instrument, considered as a contract between parties standing upon an equal footing and dealing at arm's length . . ."

[4] 7 S.Ct. Rep. at 96.

At page 57 of their brief the Respondents talk of the treaty which General Andrew Jackson and General Thomas Hinds negotiated with the Choctaws in 1820 at Doak's Stand. Although the "equal footing-implied trust" doctrine was not to be enunciated until 1845 in *Pollard* v. *Hogan* (3 How. 212), and modified in 1850 by *Goodtitle* v. *Kibbee* (9 How. 470, 478), they say it was established law in 1820; that by the treaty of that year the United States agreed that it would forever secure the Choctaws from all laws not inconsistent with the Constitution; and, as no definite declaration concerning the waters under the navigable portion of the Arkansas river was made in that treaty ". . . it then follows that a construction of this treaty that it covered lands beneath navigable waters would result in an inconsistency with the laws of the United States—and that is expressly prohibited by the language quoted above." This sophistry, now advanced for the first time by learned counsel, was not to be found in the law books of those times and much less in the minds of the ". . . weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States."[5] It has no kinship to the suasions of such spokesmen for the United States as General Andrew Jackson:

> "Brothers, you have long dwelt upon the soil you occupy; and in early times, before the white man kindled his fires too near to yours, and by settling around,

[5] *Jones* v. *Meehan*, 175 U.S. 1, 10, 11.

narrowed down the limits of the chase, you were, though uninstructed, yet a happy people. Now, your white brothers are around you; they compass you about every where; states have been created within your limits, which claim a right to govern and control your people as they do their own ciitzens, and to make them answerable to their civil and criminal codes. Your great father has not the authority to prevent this state of things, and he now asks if you are prepared and ready to submit yourselves to the laws of Mississippi; make a surrender of your ancient laws and customes, and peaceably and quietly live under those of the white man.

"Brothers, listen: to these laws, where you are, you must subject, there is no preventative, no alternative. Your great father cannot, nor can Congress, prevent it; the states only can. What then? Do you believe that you can live under those laws? That you can surrender all your ancient habits, and the forms by which you have been so long controlled? If so, your great father has nothing to say or to advise. He has only to express a hope, that you may find happiness in the determination you shall make, whatever it may be. His earnest desire is, that you may be perpetuated and preserved as a nation; and this, he believes, can only be done and secured by your consent to remove to a country beyond the Mississippi, which, for the happiness of our red friends, was laid out by the Government a long time since, and to which it was expected, ere this, they would have gone. Where you are, it is not possible you can live contented and happy. Besides, the laws of Mississippi which must operate upon you, and which your great father cannot prevent, white men, continually intruding, are with difficulty kept off your lands, and every day inconveniences and difficulties continue to increase around you.

* * * * * * *

"Brothers, listen: The only plan by which this can be done, and tranquillity for your people obtained, is, that you pass across the Mississippi to a country in all respects equal, if not superior, to the one you have. Your great father will give it to you for ever, that it may belong to you and your children while you shall exist as a Nation, free from all interruption.

* * * * * * *

"Peace invites you there, annoyance will be left behind; *within your limits, no State or Territorial authority will be permitted;* intruders, traders and above all, ardent spirits, so destructible to health and morals, will be kept from among you, only as the laws and ordinances of your nation may sanction their admission."[6]

The Respondents urge that the Choctaws should have demanded an expression in some law, some treaty, or some patent, that the avulsed beds and the soil and minerals underlying the navigable portion of the Arkansas river were to be included in the lands ceded to them by the Treaties of 1820 and 1830. They hypothesize the absence of a specific demand with the absence of a "public exigency."

They put the shoe on the wrong foot. The agreement that the United States made by the Fourth Article of its treaty with the Choctaws in 1830 ". . . that no part of the land granted to them shall ever be embraced in any Territory or State . . .," indisputably evinced a purpose not to hold the avulsed beds over and the soil and minerals in the navigable portion of the Arkansas river for the benefit of a future state. The caveat in *United States* v. *Holt State*

[6] Senate Documents Indian Removals 23d Congress 1st Session, Document 512 (Vol. II).

Bank,[7] is that had the Government wanted to retain the avulsed beds and the soil and minerals underlying the navigable streams in those lands for any purpose, it should have formally set them apart from its grant.

Even though the United States did admit a state to the Union which embraced the area ceded to the Choctaws, their rights to the avulsed beds and the soil and minerals underlying the navigable portion of the Arkansas river in Oklahoma had become vested in them by the Treaties of 1820 and 1830, and, as this Court said in *Holt State Bank*, 270 U.S. 49, 55:

> ". . . such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted or qualified accordingly. Barney v. Keokuk, 94 U. S. 324, 338, 24 L. Ed. 224; Shively v. Bowlby, 152 U. S. 1, 47, 48, 57, 58, 14 S. Ct. 548, 38 L. Ed. 331; Scott v. Lattig, 227 U. S. 229, 242, 33 S. Ct. 242, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107; Port of Seattle v. Oregon & Washington R. Co., 255 U. S. 56, 63, 41 S. Ct. 237, 65 L. Ed. 500; Brewer-Elliott Oil & Gas Co. v. United States, 260 U. S. 77, 83-85, 43 S. Ct. 60, 67 L. Ed. 140."

The Respondents suggest that the Choctaw and Chickasaw Nations should have come into court years ago to assert their rights to the bed of the navigable portion of the Arkansas river. The right of the Choctaw and Chickasaw Nations to bring an action in their own names was not established until 1951 in *Choctaw and Chickasaw Nations* v. *Seitz*, 193 F.2d 456. Even at that late date the Honorable

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[7] 270 U.S. 49, 58.

Eugene Rice, Judge of the United States District Court for the Eastern District of Oklahoma, and whose decisions are recognized as leading expositions on Indian law, dismissed an action to establish title and recover the possession of land on the ground that the tribes, being still under the tutelage of the Government, had no independent standing before the courts. The Tenth Circuit reversed Judge Rice's decision in *Choctaw and Chickasaw Nations* v. *Seitz*. Since then, this case was the first opportunity the Choctaws and Chickasaws had to assert their claim.

In the concluding paragraph of their brief the Respondents say that prior to the admission of Oklahoma as a state ". . . the United States secured the consent of petitioners to relinquishment of tribal ownership of lands and to the allotment of the lands to the Individual Tribal Members and to United States Citizenship." Without some clarification the brevity of the summation of the events which occurred between 1898 and 1907 is misleading.

By the Act of September 25, 1902 (32 Stat. 641), the Choctaws and Chickasaws did agree to allot land in value to three hundred and twenty acres of the average allotable land of the Choctaw and Chickasaw Nations to each member of the tribes and land equal in value to forty acres of the average allotable land to each Choctaw and Chickasaw freedman. All lands that were not allotted were to remain the property of the tribes.

The Act of April 6, 1906 (34 Stat. 137), provided that the lands belonging to the Choctaw and Chickasaw Tribes should not become public lands nor property of the United

States but should be held in trust by the United States for the use and benefit of the Indians respectively comprising each of those tribes. This Act also provided that the tribal existence and the tribal governments of the Choctaw and Chickasaw Tribes should continue in full force and effect for all purposes authorized by law. That provision is still in full force and effect.

The tribal lands that were not allotted to the individual members were retained by the United States as trustee. The lands involved in this action are a part of those unallotted lands and are held in trust by the United States for the benefit of the Choctaw and Chickasaw Nations.

In *Shively* v. *Bowlby*, 152 U.S. 1, at page 48, the Court enunciated the rule that Congress has the power to make grants of lands below high water marks on navigable waters in any territory of the United States, (a) whenever it becomes necessary to do so in order to perform international obligations, or (b) to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or (c) to carry out other public purposes appropriate to the objects of which the United States holds the territory. At page 50 the Court defined its expression "whenever it becomes necessary to do so in order to perform international obligations or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations" as "*in case of some international duty,*" and it defined its expression "to effect the improvement of such lands for the promotion and convenience of commerce . . . among the several states, and to carry out other public purposes

appropriate to the objects of which the United States hold the territory" as *"a public exigency."* The Court made its phrase "public exigency" synonymus with its phrase *"public purposes appropriate to the objects of which the United States hold the territory."* The removal of the Indians from the southern states to the lands west of the Mississippi was a public purpose appropriate to the objects for which the United States held the territory.

The "Indian Removal Act" of May 28, 1830, making it ". . . lawful for the President of the United States to cause so many of any territory belonging to the United States, west of the river Mississippi, not included in any State or organized territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided unto a suitable number of districts, for the reception of such tribes of Nations of Indians as may choose to exchange the lands where they now reside and remove there . . ." was a proper method through which the United States accomplished a purpose appropriate to the object for which it held the territories.

CONCLUSION

In the light of the circumstances existing at the time the treaty with the Choctaws was entered into and the objects that the United States and the Choctaws were desirous of effecting, it is obvious that the United States had no need of anything but a navigation easement on the streams in the Choctaw lands. It did not need the bed of streams that would re-emerge by avulsion. It did not need the minerals that might underlie the beds of the streams

in the Choctaw lands. It did not need to reserve the soil of the beds of navigable streams and the minerals underlying them in trust for a future state because it had guaranteed to the Choctaws ". . . that no part of the land granted to them shall ever be embraced in any Territory or State."

Viewed against the background of its efforts to remove all Indians from the southern states on to lands west of the Mississippi, it is apparent that in its treaty with the Choctaws the United States reserved nothing more than a navigation easement and the right to establish post offices, military post roads and posts as it may consider necessary.

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